APPEAL NO. 032450
FILED NOVEMBER 6, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 19, 2003. The hearing officer determined that the respondent/cross-appellant (claimant) did not sustain an injury in the course and scope of her employment on _____; that the appellant/cross-respondent (carrier) waived the right to contest the compensability of the claimed injury by not timely contesting it in accordance with Sections 409.021 and 409.022; and that, because the carrier waived the right to contest compensability, the claimant sustained a compensable injury on _____. The carrier appeals the waiver determination and its resulting effect on compensability. The claimant appeals the finding of fact that she was not injured in the course and scope of her employment on _____. The claimant responded to the carrier's request for review. The appeal file contains no response from the carrier to the claimant's appeal.

DECISION

Affirmed.

In determining whether the hearing officer's decision is sufficiently supported by the evidence, we will generally not consider evidence that was not submitted into the record at the hearing and is raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the document attached to the carrier's appeal, which was not admitted into evidence at the hearing. The document, an e-mail from the Texas Workers' Compensation Commission (Commission) acknowledging receipt of the carrier's electronic transmission of the "cert-21," was transmitted on March 18, 2003, and, as such, does not require the case be remanded for further consideration.

Section 409.021(a) requires that a carrier act to initiate benefits or to dispute compensability within seven days of first receiving written notice of an injury or waive its right to dispute compensability. *See* Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002); Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003. It is undisputed that the carrier first received written notice of the claimed injury on March 17, 2003. The carrier contended at the hearing, and again urges on appeal, that it complied with the requirements of Downs by timely

filing electronically a "cert-21." However, at the hearing, the carrier did not have a copy of the Commission's e-mail acknowledging receipt of the "cert-21." The carrier requested that the hearing officer take judicial notice of the "whole [Commission] file." The hearing officer declined to do so and recessed the hearing for five minutes in order to afford the carrier's attorney an opportunity to locate the desired documentation. When the hearing reconvened, the carrier declined to offer any additional documentary evidence. While the Appeals Panel has held that a hearing officer must take official notice of essential Commission records where compliance with the 1989 Act is at issue (s*ee* Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994), Advisory 2002-15, issued September 12, 2002, makes clear that with regard to the filing of "cert-21s," the Commission "will not retain copies of these ["cert-21"] forms" and that "insurance carriers will be responsible for providing the [Commission] acknowledged forms at any subsequent dispute." Because a review of the Commission's records would not, in this case, reveal the date upon which the carrier electronically filed the "cert-21," we perceive no reversible error in the hearing officer's refusal to take official notice of the records.

Finally, the carrier argues that because the hearing officer found that the claimant did not sustain an injury in the course and scope of her employment on the date in question, the hearing officer erred in concluding that the injury is nevertheless compensable due to the carrier's waiver of the right to contest compensability. The carrier's reliance on Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.) in support of its position is misplaced because in that case the court held that if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law. However, in the present case there is evidence that the claimant has damage or harm to the physical structure of her body. The Appeals Panel has recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no injury, as opposed to cases where there is an injury which was determined by the hearing officer not to be causally related to the claimant's employment. Texas Workers' Compensation Commission Appeal No. 020941, decided June 6, 2002. In this case, the hearing officer has identified injuries that are supported by medical evidence, and, as such, we cannot agree that Williamson mandates a determination that there is no compensable injury.

With regard to the claimant's appeal, whether the claimant sustained an injury in the course and scope of her employment on _____, was a factual question for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines that facts have been established from the evidence presented. Nothing in our review of the record indicates that the hearing officer's course-and-scope determination is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Edward Vilano
Appeals Judge